

Decision No. R19-0914

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19R-0458T

IN THE MATTER OF THE PROPOSED AMENDMENTS TO RULES REGULATING TELECOMMUNICATIONS SERVICES AND PROVIDERS OF TELECOMMUNICATIONS SERVICES, 4 CODE OF COLORADO REGULATIONS 723-2-2840, REGARDING SENATE BILL 19-078.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
ADOPTING RULES**

Mailed Date: November 8, 2019

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I. STATEMENT**A. Summary.**

1. This Decision adopts amendments to the Commission's Rules Regulating Telecommunications Services and Providers of Telecommunications Services, 4 *Code of Colorado Regulations* (CCR) 723-2 (Telecom Rules) with minor modifications to the rules proposed in the Commission's Notice of Proposed Rulemaking in Decision No. C19-0704.¹

II. BACKGROUND, ANALYSIS, DISCUSSION, AND CONCLUSIONS.**A. Background.**

2. During its weekly meeting held August 21, 2019, the Colorado Public Utilities Commission (Commission) adopted a Notice of Proposed Rulemaking (Notice) seeking to amend the Telecom Rules to implement aspects of Senate Bill (SB) 19-078 which involve the Commission. *See* Decision No. C19-0704, ¶ 2. At the same time, the Commission referred this matter to an Administrative Law Judge (ALJ) to hold a hearing and issue a recommended decision on the proposed rules. *Id.* at Ordering ¶ 2.

3. Before the Commission issued the Notice, consistent with § 24-4-103(2), C.R.S., it established representative groups of participants with an interest in the subject of this rulemaking; those groups submitted views and informally participated "on the proposal under consideration." Decision No. C19-0704, ¶ 6. As additional outreach, before the Notice was issued, Commission Staff presented proposed Rule 2850 to the Broadband Deployment Board (the Board) and its participants, (including internet service providers), at the Board's regular

¹ In reaching this Decision, the Administrative Law Judge has considered the entire record in this proceeding, including all aspects of the proposed rules, the relevant law, and all public comments in this proceeding, even if not specifically discussed.

public meeting on June 27, 2019; no one provided any changes, revisions, or comments on the proposed Rule 2850. *Id.* Commission Staff also requested input on the proposed rule throughout July of 2019. *Id.*

4. The Commission's Notice (Decision No. C19-0704) and a copy of the proposed amended rules in redlined form was published in the September 10, 2019 edition of *The Colorado Register*. *Id.* at Ordering ¶ 1. The Notice informs the public that interested persons may file written comments in this proceeding, and requests that initial written comments be provided by September 20, 2019, with responsive written comments to be filed by October 4, 2019. *Id.* at Ordering ¶ 5.

5. The Notice states that a hearing on the proposed rules will be held on October 21, 2019 at 9:00 a.m. in a Commission hearing room (and includes the address for the hearing location). *Id.* at Ordering ¶ 3. The Notice explains that interested persons may submit written or verbal comments at the hearing. *Id.* at Ordering ¶ 4.

6. The ALJ convened a hearing as noticed on October 21, 2019 at 9:00 a.m. Mr. Brian Martin, Interim Director for the Broadband Fund, provided verbal comments during the hearing. One other person appeared but did not offer comments. After Mr. Martin finished providing comments, the ALJ took a 15-minute recess to allow interested persons additional time to appear. The ALJ reconvened the hearing at 9:30 a.m., and held the hearing until 9:45 a.m. No one else appeared to provide public comments. Given that no one else appeared to provide comment by 9:45 a.m., the ALJ determined that further hearings were unnecessary and adjourned the hearing. At the same time, the ALJ held the record open until close of business on October 21, 2019 for any additional written comments to be submitted.

7. No written comments were submitted at any point.

B. Analysis, Discussion, and Conclusions.**1. Relevant Statutes and Proposed Rule.**

8. The impetus behind this rulemaking is SB 19-078; that bill became effective on May 17, 2019, and, as relevant here, is codified at §§ 40-15-209 and 509.5, C.R.S. Section 40-15-509.5(8.3)(a), C.R.S. (2019), requires the Board to periodically review the federal trade and communication commissions' websites to determine whether either agency has issued a final order or entered into a consent decree involving an internet service provider who has received broadband deployment grant money from the Board. The statute requires the Board to inform the Commission "pursuant to section 40-15-209 (2)(a) about any internet service provider awarded broadband deployment grant money that is subject to such an order or decree." § 40-15-509.5(8.3)(b), C.R.S.

9. In turn, § 40-15-209(2)(a), C.R.S., requires the Commission to issue a written order requiring an internet service provider to fully refund any money that it received in the prior 24 months from the high cost support mechanism (HSCM) pursuant to a grant the Board awarded under § 40-15-509.5, C.R.S., when the Commission learns from the Board that it determined from a final order, decree, or judgment that the provider has engaged in conduct specified in § 40-15-209(1), C.R.S.² As relevant here, § 40-15-209(1), C.R.S., bars internet service providers from receiving grants from the Board if it: blocks lawful internet content, application, services, or devices; engages in paid content prioritization; regulates network traffic by throttling bandwidth or otherwise impairs or degrades lawful internet traffic on the basis of

² Grants awarded under § 40-15-509.5, C.R.S. are funded, at least in part, by money the Commission collects for the Colorado high cost support mechanism (HSCM). §§ 40-15-509.5(3), (4)(a) and (8); 40-15-208, C.R.S.

content, application, service, or use of a non-harmful device; or fails or refuses to disclose its network management practices.

10. Section 40-15-209(2)(d), C.R.S., provides that a Commission order requiring an internet service provider to refund Board grant money does not alleviate providers from fulfilling any obligations they may have as a provider-of-last-resort under article 15 of Title 40. The statute includes other requirements, such as minimum content of a Commission order to refund grant money. *See* § 40-15-209(2)(b) and (c), C.R.S.

11. The most significant aspect of the proposed rules is the process that must be followed before the Commission may issue an order requiring an internet service provider to refund HCSM grant money. Proposed Rule 2850 directs the Board to file a petition with the Commission that notifies the Commission that the Board has made a final determination that: a federal agency has issued a final order or entered into a settlement or consent decree regarding an internet service provider, or a court has issued a final judgment against an internet service provider who received HSCM grant funds; the order, settlement consent decree, or judgment concludes that the provider has engaged in violations specified in § 40-15-209(1)(a) through (d), C.R.S.; the provider is not exempt under § 40-15-209(3), C.R.S., and that the Board seeks an order requiring the provider to refund grant money to the HCSM. *See* Attachment A at 8-9 to Decision No. C19-0704 (Proposed Rule 2850). Thus, consistent with the plain language in § 40-15-209(2)(a), C.R.S., the proposed rule focuses on establishing that the Board made the required determinations, but does not require the Commission to make its own determination that an internet service provider has violated a net neutrality provision in § 40-15-209, C.R.S.

12. Proposed Rule 2850 also requires the Board's petition to provide: its written determinations; supporting documentation for its written determinations; an affirmation or

attestation that the Board determined that the exceptions in § 40-15-209(3), C.R.S., do not apply; the itemized grant award amounts paid to the internet service provider in the 24 months preceding the Board's final determination; and any other information the Board deems relevant. *Id.* at 9.

13. Under proposed Rule 2850(a), petitions seeking an order to refund HSCM money must be filed "pursuant to the Commission's Rules of Practice and Procedure, 4 CCR 723-1-1304(i)."

2. Statutory Authority.

14. The Commission has authority to promulgate such rules as are necessary for the proper administration and enforcement of Title 40, Colorado Revised Statutes. § 40-2-108(1), C.R.S. The proposed rules are necessary to implement requirements in § 40-15-209, C.R.S., and facilitate compliance with § 40-15-509.5(8.3)(a), C.R.S. For these reasons, the ALJ concludes that the Commission has statutory authority to promulgate the proposed rules.

3. Public Comment.

15. No written comments were submitted in this proceeding. Mr. Brian Martin, Interim Director of the Broadband Fund, presented the only public comments in this proceeding during the rulemaking hearing. Mr. Martin explained that the Broadband Fund oversees the funds obligated by the Board and that the Board still does not have a process or policy in place for the Board's determinations under SB 19-078.³ He stated that he expects the Board to review a possible process or policy in November 2019, and that the process or policy will be published on the Board's website once it has been approved. Mr. Martin also stated that since the summer of

³ When it noticed the proposed rules, the Commission remarked that the Board did not have a process or policy in place to guide its determinations under SB 19-078. Decision No. C19-0704 at ¶ 8.

2019, the Board's new grant agreements with internet service providers to receive HSCM grant funds include language acknowledging net neutrality requirements. Mr. Martin offered no suggestions or other comments concerning the proposed rules.

4. Minor Changes to Proposed Rule 2850.

16. The ALJ finds that a few minor clean-up changes are necessary to ensure the proposed rules are unambiguous, clear, and consistent with § 40-15-209, C.R.S. *See* § 24-4-103(4)(b)(III) and (IV), C.R.S. (2019). Specifically, proposed Rule 2850(a) states, in pertinent part:

The broadband deployment board (board) shall file a petition pursuant to the Commission's Rules of Practice and Procedure 4 CCR 723-1-1304(i) requesting that the Commission initiate a proceeding pursuant to §§ 40-15-209(2)(a) and 40-15-509.5, C.R.S. and notifying the Commission that the board has determined that:

(I) . . .

(II) the order, settlement consent decree or judgment concludes that the internet service provider has engaged in net neutrality violations specified in § 40-15-209(1)(a) through (d), C.R.S.;

(III) . . . and

(IV) the board requests the Commission issue a written order to the internet service provider requiring the internet service provider fully refund any money that the internet service provider received in the twenty-four months preceding the board's determination from the high cost support mechanism pursuant to a grant awarded by the board pursuant to § 40-15-509.5, C.R.S.

Attachment A at 8 to Decision No. C19-0704. Subsection (a)(II)'s reference to "violations" in the plural implies that the Board must determine that an internet service provider has engaged in all of the violations identified in § 40-15-209(1)(a) through (d), C.R.S. This creates a potential ambiguity, and may be inconsistent with § 40-15-209(1), C.R.S., which treats the four violations in subparagraphs (a) through (d) as independent alternative violations. That is because the statute uses "or" as the conjunction for the violations listed in paragraphs (a) through (d).

§ 40-15-200(1), C.R.S. To eliminate the potential ambiguity and ensure consistency with § 40-15-209(1), C.R.S., the ALJ will modify the referenced language to change it from plural to singular.⁴ In addition, as drafted, subsection (a)(IV) is confusing, which may create an unnecessary ambiguity. The ALJ will modify Rule 2850(a) to eliminate this ambiguity. With the changes highlighted, Rule 2850(a) will read:

The broadband deployment board (board) shall file a petition pursuant to the Commission's Rules of Practice and Procedure 4 CCR 723-1-1304(i) requesting that the Commission initiate a proceeding and issue a written order pursuant to §§ 40-15-209(2)(a) and 40-15-509.5, C.R.S. and notifying the Commission that the board has determined that:

(I) . . .

(II) the order, settlement consent decree or judgment concludes that the internet service provider has engaged in a net neutrality violations specified in § 40-15-209(1)(a) through (d), C.R.S.;

(III) . . . and

(IV) ~~the board requests the Commission issue a written order to the internet service provider~~ should be required to the internet service provider fully refund any money that the internet service provider received in the twenty-four months preceding the board's determination from the high cost support mechanism pursuant to a grant awarded by the board under ~~pursuant to~~ § 40-15-509.5, C.R.S.

17. Proposed Rule 2850(b) sets the minimum requirements for petitions; it states that a "petition filed . . . should include at least . . ." the items listed in proposed Rule 2850(b)(I) through (VI). Attachment A at 9 to Decision No. C19-0704. Though the context implies these are mandatory minimum requirements, the ALJ finds that substituting "must" for "should" in the quoted language will appropriately eliminate potential ambiguity, and will modify the language accordingly.

⁴ This change makes the Rule internally consistent given that proposed Rule 2850(f) references "a net neutrality violation pursuant to § 40-15-209, C.R.S. . . ." This also indicates that proposed Rule 2850(a)(II)'s use of the plural was unintentional.

18. Proposed Rule 2850(d) states that “[t]hrough this proceeding, the Commission shall confirm that the board made determinations set forth in subsections (a)(II) and (III) of this rule.” The ALJ finds that the language “[t]hrough this proceeding” may be ambiguous or confusing, particularly if referenced or quoted separate from other provisions in Rule 2850. The ALJ will modify the language to eliminate this ambiguity. In addition, as drafted, the language implies that the Commission will not confirm that the Board has made all the determinations required by Rule 2850(a). This is inconsistent with subsection (a), and thus, creates an ambiguity. The ALJ will modify the rule accordingly. Doing so does not expand the Commission’s overarching role to confirm that the Board made the necessary determinations. With the changes highlighted, the relevant portions of Rule 2850(d) will read, “[t]hrough ~~this~~ proceedings under this rule, the Commission shall confirm that the board made determinations set forth in subsections~~paragraph~~ (a)(I) and (III) of this rule.”

19. The ALJ finds that the minor changes to proposed Rule 2850 will help eliminate ambiguities and ensure consistency with the relevant statutes.⁵ See § 24-4-103(4)(b)(III) and (IV), C.R.S. The ALJ also finds that the changes are consistent with the scope and subject of the Notice of Proposed Rulemaking.

5. Proposed Rule 2850’s Due Process Protections.

20. When it noticed the proposed rules, the Commission suggested that comments address whether the process in proposed Rule 2850 is efficient and effective to meet the needs of

⁵ The ALJ considered that proposed Rule 2850(f) reiterates the statutory mandate that internet service providers required to refund grant money are not relieved of their obligations as providers-of-last resort, but does not define those obligations or the meaning of “provider-of-last-resort.” Given that § 40-15-209(2)(d), C.R.S., specifically explains that internet service providers ordered to refund grant money are not relieved from “any provider-of-last-resort obligations that the . . . provider otherwise has pursuant to this article 15,” it is unnecessary to identify those obligations in Rule 2850. In addition, other Commission rules fill any potential gaps. See *e.g.*, Rules 2001(fff), 2183, 2184, and 2185, 4 CCR 723-2.

SB 19-078, or if another process would better meet flexibility and due process needs in the circumstances. Decision No. C19-0704, ¶ 8. The Commission also asked the ALJ to consider and address the proposed petition process. *Id.* As explained below, the ALJ has considered these issues, and concludes that proposed Rule 2850 provides appropriate due process protections while offering the Commission flexibility appropriate to the circumstances.

21. Significantly, because proposed Rule 2850(a) requires that petitions be filed pursuant to the Commission's Rules of Practice and Procedure, (4 CCR 723-1), those rules apply to the petitions under proposed Rule 2850. As a result, the extensive due process protections in the Rules of Practice and Procedure apply to a petition filed under proposed Rule 2850. For example, the Rules of Practice and Procedure provide for notice of a petition, the opportunity to object to a petition, and the opportunity to be heard by an impartial administrative tribunal. Rules 1206, 1401, and 1404, 4 CCR 723-1. As the proponent of an order under proposed Rule 2850, the Board will carry the burden of proof by a preponderance of the evidence. Rule 1500, 4 CCR 723-1. In addition, the Rules of Practice and Procedure allow parties to request rehearing, reargument, or reconsideration of a recommended decision on a petition; appeal a recommended decision by filing exceptions to the Commission; and seek judicial review of the Commission's final decision. Rules 1505(a), 1506(a), and 1507, 4 CCR 723-1.

22. Proposed Rule 2850 includes other procedural protections. For example, proposed Rule 2850(b) requires the Board to include certain information and supporting documentation with a petition. These requirements build upon and enhance the procedural protections afforded through the Commission's Rules of Practice and Procedure because it provides

information up-front as to the basis and evidentiary support for the petition. This ensures that entities or individuals potentially impacted by a decision granting or denying a petition have the opportunity to review the petition's supporting information and materials early in the process, and object to the petition and intervene based on that information.

23. In addition, proposed Rule 2850(b) sets the minimum information and documents that a petition should include; because the rule sets the floor, and not the ceiling, it preserves the Commission's discretion to require the Board to provide additional information. This provides appropriate flexibility so that the Commission may require additional information or materials when appropriate in the circumstances.

24. For the reasons discussed above, the ALJ concludes that the proposed petition process, with the minor changes outlined above, provides appropriate due process protections. *See Babi v. Colorado High School Activities Ass'n*, 722 P.3d 916, 922 (Colo. App. 2003) (due process is flexible and calls for procedural protections the particular situation demands; notice and an opportunity for a hearing appropriate to the nature of the case are essential due process elements).⁶ The ALJ also finds that the proposed petition process affords flexibility appropriate to the circumstances of each given case, while also ensuring that the Commission's process is consistent with statutory mandates in § 40-15-209, C.R.S., and procedural due process.

25. The ALJ recommends that the Commission approve the proposed rules with the minor modifications discussed above.

⁶ It is worth noting that petitions under proposed Rule 2850 may only be brought after another tribunal, *i.e.*, a federal agency or court of competent jurisdiction, has made a final determination that an internet service provider has engaged in conduct identified in § 40-15-209(1), C.R.S. Thus, when a petition under proposed Rule 2850 is filed, it is highly likely that the effected internet service provider received extensive due process in the underlying adjudication before a federal agency or a court of competent jurisdiction. Even so, the Commission's process provides significant due process protections, as discussed above.

26. A redlined version of the proposed rules with the minor changes is included as Attachment A and a clean version of the proposed rules with the minor modifications is included as Attachment B.

27. Being fully advised in this matter and consistent with the above discussion, in accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding along with the written recommended decision and attachments.

III. ORDER

A. The Commission Orders That:

1. The Rules Regulating Telecommunications Services and Providers of Telecommunications Services, 4 *Code of Colorado Regulations* 723-2-2841 through 2851 contained in final format attached to this Recommended Decision as Attachment B are adopted.

2. The rules in final format and redline (Attachments A and B), are available through the Commission's E-Filings system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=19R-0458T

3. This Recommended Decision will be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision will be served upon the parties, who may file exceptions to it.

5. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision will become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

6. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Decision are filed, they may not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director